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courts in some recent decisions, the issues that will draw further litigation in the near future relate to the arbitrability of ERISA and age discrimination statutes, the enforceability of Rule 15c2-2 disclaimer clauses in pre-dispute arbitration agreements, preemption issues, and the availability of punitive damages in arbitration.

Ms. Masucci reviewed the Association's efforts to improve arbitration and the substance and impact of the new arbitration rules. Among other things, she stated that the NASD arbitration budget

for the coming year is \$10 million, only \$3 million of which is expected to be recovered in fees. She estimates that some 3,500 cases will be filed in 1989 (there were 2633 as of mid-September). She also indicated that NASD's Board of Governors had approved a hike in the fees assessed for party postponements, from the current \$100 to a graduated scale which comports with a recent SICA proposal on this subject (2 SAC 6(6)).

Mr. Mandel explained the preparation he undertakes in preparing to respond

to a Statement of Claim and in evaluating that claim. He also discussed the NASD's pilot program on mediation. Mediation is a non-binding process in which disputants seek, voluntarily and with the help of a disinterested intermediary, to settle the controversy. While the mediation program is still in its early stages, he views the process itself as "useful" in many cases where negotiations are otherwise stalled. Properly implemented, mediation can be speedy, inexpensive, and beneficial for all parties.

## SAC Surveys Public Award Results

In the September edition of the *SAC Award Reporter*, we published summary information about 110 NYSE and ASE Awards that issued in August 1989. We are currently inputting a large number of Awards recently retrieved from NASD's Rockville, Maryland storage facilities and will display the first 200 or so of these new Awards in the upcoming edition of the *Reporter*. By year-end, SAC should have well in excess of 1,000 Awards in our files.

With almost 300 Awards currently tabulated, we thought readers might want a preview of some general, statistical information reflected in the database at this point. For some inquiries, we still view the database as too small, but where we felt the sample sizes were adequate, we set out some questions and obtained the following results.

Please understand two things as you read through the figures that appear below. First, interpretation and truncation of the information provided on the summary sheets has sometimes been necessary in classifying the data. For example, a case will be classified as "Member/Customer," even though the Member may have filed the case for a declaration of non-liability after compelling the client's claim to arbitration. Where a customer files against a member and the member

files a third-party claim against the stock broker, the case is classified only as "Customer/Member."

Secondly, information required on the summary sheet for a particular Award is sometimes absent, so the conclusions drawn can be skewed by the absence of important data. This has occurred primarily with NASD Awards. As the SRO's become acclimatized to the reporting and the size of the Award database grows, the impact and frequency of missing data will diminish. Nevertheless, where relevant, we have tried to allow for these instances in presenting the following summary.

### Claims vs. Awards

#### All Awards

The 273 Awards used in this review comprise only those which have been published in our three prior supplements to readers. Among the 273 Awards, there were 269 in which the type of dispute could be identified: Customer/Member (149); Customer/Employee (4); Employee/Member (17); Member/Customer (28); Member/Employee (17); Member/Member (8); Dealer (non-member)/Member (2); Small Claims (44).

The 269 Awards involved compensatory claims of \$58,676,300 and resulted in Awards of \$16,446,721, or 28% of the

compensatory claims. There were 165 cases in which the Claimant received some amount on the claim, indicating that Claimants of all varieties were victorious to some degree in 61.3% of the cases. The winning Claimants accounted for \$38,137,100 of the total compensatory claims. Thus, as to those cases only, the amount awarded constituted 43.1% of the compensatory claims.

Unfortunately, in 80 of the 269 cases, the amount of the compensatory claim was not provided; however, the statistical results were not greatly disturbed. When these 80 cases are excluded from the results, the compensatory claim figure remains at \$58.6 million, but the total amount awarded declines to \$15,210,220. As to the remaining 189 cases, then, Claimants won in 115 instances or 60.8% of the cases. Winning Claimants received 39.9% of their compensatory claims.

#### Customer Awards

There were 149 Customer/Member Awards, reflecting total compensatory claims of \$29,623,500 and total amounts awarded of \$10,045,500, or 33.9% of the compensatory claims. Forty-seven Awards do not indicate an amount for compensatory claims. This is a large part of the Customer/Member sample; however, these cases are fairly evenly distrib-

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uted among the winners and losers, so the win/loss ratio is not dramatically affected. Customers won some amount on their claims in 76 of the 149 cases, or 51% of the time. When adjusted for the 47 "incomplete" cases, there remain 102 cases, wherein customers won in 50 instances, or 49% of the time.

The total amount awarded, when the 47 "incomplete" cases are eliminated, declines modestly to \$9,198,200, or 31.1% of the \$29.6 million in total compensatory claims. Those Claimants who won some amount in prosecuting their arbitration claims accounted for \$18,290,800. in compensatory claims. Thus, Claimants who won received 50.3% of their compensatory claims in the 50 cases where precise numbers were available.

/ We looked at the larger claims and Awards to see whether the figures were skewed unfairly by large numbers in iso-

lated Awards. There was one case (Dreieck Finanz v. Nikko Securities - SAC ID #8906034) in which the amount awarded was \$4.7 million, accounting for more than half of the \$9.2 million in total awards. The percentage of amount awarded compared to the \$8.1 million in compensatory claims in the Dreieck case was about 58%; however, there were several other large, winning claims where the amount awarded was significantly less than 50%. In aggregate, these more than made up for the slight upward skewing caused by Dreieck.

**Beyond Compensatory**

**Attorney Fees**

Historically, the award of attorney fees has been relatively infrequent. In the past, a specific provision in a disputed agreement or promissory note has generally provided the predicate for such an Award. In fact, Section 10 of the Uniform Arbitration Act specifically excludes attorney

fees from the expenses and fees that can be provided for in an arbitration award, "[u]nless otherwise provided in the agreement to arbitrate...." The Federal Arbitration Act is silent on the point, however. The SICA Arbitrator's Manual states the American Rule, but suggests that there can be exceptions. "For instance, if there is an agreement that provides for an award of attorneys' fees, it is within the discretion of the panel to do so." (See Dyer article, 2 SAC 8 (1), criticizing this position as too limited).

The incidence of attorney fee awards in the cases reviewed was, based on this background, surprisingly high (while the Arbitrator's Manual advises panels to state the basis for an award of attorney fees, we did not see explanations given on the summary sheets or any attached Awards). Attorney fees were granted to prevailing parties in 18 of the 273 cases, for a total of \$220,400. Fees were claimed

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**Table of Awards - Customer/Member Awards By Sales Practice Allegations**

Award Category	No. of Cases	Compensatory Claimed	Total Amount Awarded	Percentage Claimed:Awarded
All Awards	273	\$58,676,300	\$16,446,721	28%
Customer/Member Awards	149	\$29,623,500	\$10,045,500	34%
<b><u>By Allegation:*</u></b>				
Suitability	30	\$4,644,700	\$943,000	20%
Fraud; Misrep'ns.	21	\$3,446,800	\$928,200	27%
Unauth'd Trading	14	\$1,156,300	\$383,500	33%
Fail to Obey; Negligence	12	\$2,225,400	\$380,400	17%
Churning	5	\$1,470,700	\$1,562,200	106%

\* The allegations shown are the primary allegations indicated in the Statement of Claim, gleaned from a review of the SRO's Summary Sheet. In 46 of the 149 cases, insufficient information was provided in which to discern even the primary allegation in the Statement of Claim.

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in 84 of the 273 cases and in 51 of the 149 Customer/Member cases. \$70,900 in attorney fees was awarded to customers in 7 of the 149 Customer/Member cases. Seven of the remaining 11 Awards involved Member/Customer disputes over debit balances. The general range of amounts awarded for attorney fees was approximately \$5-\$15,000, but two of the Awards were for \$45,200 and \$50,400.

**Punitive Damages**

Punitive damage claims were fairly common, but none succeeded among the 273 cases surveyed. Forty-two of the 51 claims asserted appeared in Customer/Member disputes. Although losing on the punitive claims, clients and their attorneys appear to have fairly evaluated their underlying claims as meritorious, in asserting a basis for punitives, since only 14 of the 42 cases failed to win some amount from the arbitrators. Of the 20 winners that reflected amounts for both compensatory claimed and amount awarded, the figures indicate that customers won \$7,305,100 on \$11,466,400 in compensatory claims, or 63.7% (without the Dreieck case, the percentage would have been 77.4%). This is a significantly higher "win" rate and return than for Customer/Member cases overall.

**Past Surveys**

Two earlier surveys offer some basis for comparison with our observation that customers, as a whole, received 33.9% of total compensatory damages claimed (31.1% on an adjusted basis), among the cases SAC reviewed.

Dean Witter Reynolds' Deputy General Counsel Paul J. Dubow presented results of an in-house study in testimony before the Massachusetts Securities Division in July 1988 (1 SAC 5 (9)). The study considered all customer cases concluded during 1987, including all settlements, judgments and arbitration awards. Those results were later refined and presented in testimony before the Maryland State Senate Judicial Proceedings Committee in March 1989. Among the arbitration results disclosed by Mr. Dubow was the finding that "the total recovery of all customers who chose to arbitrate was 37% of the total compensatory damages demanded by all customers who arbitrated, including those who did not prevail."

The NYSE/Deloitte Haskins & Sells Comparison Survey (See "SAC Supplement," 1 SAC 7), as in the Dean Witter survey, reviewed both settlement and

award results, but it covered cases terminated at six brokerage firms for more recent periods between October 1, 1987 and June 30, 1988. The comparisons between total payments and total compensatory claims for cases in arbitration indicated customers received 29.3% of their compensatory claims. If the customer chose arbitration, as opposed to transferring in from litigation, the percentage rose to 37.7%.

Surveys of this sort, we hope, will begin to dispel (or confirm) some of the "common wisdom" about arbitration. A skeptical approach is always appropriate when dealing with gross statistics, but over time these exercises can produce reliable observations to guide decision-making and pinpoint trends. We invite subscribers to write to SAC with questions we can survey and test the assumptions gained through their experiences in arbitration.

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## Recent Articles & Cases

As a regular feature, SAC lists articles and cases of interest in the field of arbitration law. If you find one we missed or are in a case that produces an interesting decision, please write and tell us about it. We thank those readers who have contributed case opinions and who, by doing so, help us all to keep informed. Credit is given to contributors at the end of the relevant case summaries.

### Articles

**The Case for a Single Securities & Commodities Arbitration Forum**, by Philip J. Hoblin, Jr., 9 Commodities Law

Letter 6((3) (August 1989).

Mr. Hoblin, a founding member of the Securities Industry Conference on Arbitration, champions a view in this article that has been studied from time to time by SICA (e.g., see 1 SAC 2(1) and 2 SAC 6(6)), but has not yet gained the momentum or support necessary to move past the concept stage. As a major structural revision, the idea of consolidating the ten securities SRO forums into a single independent (albeit, industry-subsidized) forum is a bold one, but Mr. Hoblin presents a persuasive case. In this essay, he also advances the stimulating proposal that the new structure include the major commodities arbitration forum

of the National Futures Association.

Commencing with a statistical review of the growth in SRO arbitration in recent years, Mr. Hoblin argues that arbitration's elevated status in dispute resolution and its increased visibility require continuous scrutiny of the system's efficacy. According to these statistics, nearly 4,500 customer claims were filed in 1988. Among the securities SRO's, the NYSE handles 26.6% of the case volume and the NASD handles 65.4%. Approximately 70% of the claims at the NYSE are customer-related, 25% are employee-related, and 5% are member-to-member disputes. At the NASD, the correspond-

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